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# ORGAN TRAFFICKING AND THE TVPA: WHY ONE WORD MAKES A DIFFERENCE IN INTERNATIONAL ENFORCEMENT EFFORTS

*Elizabeth Pugliese\**

## INTRODUCTION

A guy goes into a bar for a drink. The next morning, he wakes up in a hotel bathtub covered in ice up to his chest. There is a note taped to the wall that tells him not to move and to immediately call 9-1-1 from the cell phone next to the tub. He does and the operator tells him to carefully feel his back. The man feels a closed incision. The operator tells him to remain calm, an ambulance is on the way. Then the operator tells him what happened; he is the victim of organ theft.<sup>1</sup>

This story is an urban myth. The reality is, although no one is waking up in bathtubs without kidneys, organs are being sold, sometimes willingly, sometimes not. This is not a legal market like the buying or selling of corn. It is a black market taking place in unsafe conditions. It is more unsafe for the donor, but such operations are not exactly safe for the recipient either. This black market is called organ trafficking.

This Comment examines the need for the Federal Trafficking Victims Protection Act (TVPA) to include organ trafficking in the definition of human trafficking in order to bring it into accord with the international Trafficking Protocol in order to enhance enforcement efforts. First, some facts related to human trafficking are presented. Organ trafficking myths and realities are also presented. The comment then provides the definitions of human trafficking found in the federal law and the international treaty. The analysis focuses on the need to unify definitions for human trafficking among nations in order to carry out effective collaborative international efforts. Further, the fact that victims of organ trafficking are denied benefits under the TVPA to which other victims of trafficking are entitled is

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\* B.A., Holy Names University, Oakland, CA, 1988; M.A., St. Mary's University, San Antonio, TX, 1998; J.D. Candidate, The Catholic University of America, Columbus School of Law, May 2008. Thank you to Professor Geoffrey R. Watson for serving as my expert reader. Thank you also to all my friends and family who supported throughout the writing process.

1. Snopes.com, You've Got to Be Kidneying, <http://www.snopes.com/horrors/robbery/kidney.asp> (last visited Nov. 11, 2007).

analyzed. While the Comment addresses the issue that too broad of a definition may overwhelm prevention and prosecution efforts, this concern is negligible in the overall fight against human trafficking of all types. Equally ineffective is the argument that the United States currently has a law prohibiting organ trafficking, considering that most of the other human trafficking activities are also prohibited under other federal or state laws. The TVPA was enacted because the laws related to human trafficking conditions were ineffective, and the same holds true for organ trafficking. By including organ trafficking in the definition of trafficking, it enables other laws to be passed to prosecute all the participants, as is the case with the other forms of trafficking currently covered by the TVPA. In conclusion, the inclusion of organ trafficking in the TVPA will enhance international and domestic efforts to end organ trafficking without affecting the efforts against other forms of human trafficking. This inclusion will also allow the United States to maintain its leadership position in fighting this fast growing transnational crime in all its forms.

## I. BACKGROUND

### A. *Facts of Trafficking*

Approximately 700,000 people are trafficked throughout the world every year.<sup>2</sup> Exact numbers are difficult to ascertain since trafficking is mostly a hidden crime.<sup>3</sup> The United States is both an origin country<sup>4</sup> and a destination country<sup>5</sup> with roughly 50,000 people trafficking into this country each year.<sup>6</sup> Trafficking is a growing business for international organized crime.<sup>7</sup> It is tied for second place as the largest illegal business with arms

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2. Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(1) (2000).

3. Free the Slaves, Wash., D.C., & Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 57 (2005).

4. Colin Powell, U.S. Sec'y of State, Remarks at Special Briefing on the Release of the 2001 Trafficking in Persons Report (July 12, 2001), <http://www.state.gov/g/tip/rls/rm/2001/4071.htm>.

5. *Id.*

6. 22 U.S.C. § 7101(b)(1).

7. *Id.* § 7101(b)(8).

sales, only drug dealing is a larger illegal activity.<sup>8</sup> The United States has recognized that it must take transnational efforts to prevent and punish the perpetrators.<sup>9</sup>

Victims are trafficked in every kind of labor or service: agriculture, garment factory sweatshops, domestic services, prostitution, and “begging rings.”<sup>10</sup> The victims are usually lured to the United States with promises of good jobs, or that the “benefactor” (in reality, the trafficker) will pay for the person’s education.<sup>11</sup> For example, a couple in Maryland used a false passport to bring a fourteen-year-old girl from Cameroon.<sup>12</sup> They promised her mother she would receive an American education.<sup>13</sup> Once in the United States, she was forced to work as the couple’s maid and care for their children.<sup>14</sup> She was not allowed to leave the apartment alone and she was routinely beaten.<sup>15</sup> She was constantly threatened with deportation if she tried to leave.<sup>16</sup> Her traffickers were caught and they were sentenced to nine years in prison and ordered to pay restitution.<sup>17</sup>

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8. Univ. of Iowa Ctr. for Human Rights, UICHR Human Rights Index #15 – Human Trafficking, [http://www.uiowa.edu/~uichr/conferences/HR\\_index\\_spring06.html](http://www.uiowa.edu/~uichr/conferences/HR_index_spring06.html) (last visited Nov. 11, 2007).

9. 22 U.S.C. § 7101(b)(24).

10. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005, at 1-2 (2006) [hereinafter DEP’T OF JUSTICE REPORT 2001-2005].

11. *Id.* at 2.

12. *Id.*

13. *Id.*

14. *Id.*

15. DEP’T OF JUSTICE REPORT 2001-2005, *supra* note 10, at 2.

16. *Id.*

17. *Id.*

## B. Organ Trafficking: Myths and Reality

### 1. "Baby Parts" Myth

In 1987, the former Secretary General of the Honduran Committee for Social Welfare, Leonardo Villeda Bermudez, stated in an interview that Americans, Canadians, Europeans, and Israelis were adopting Honduran children in order to harvest their organs.<sup>18</sup> He later retracted the statement, but the rumors continued to spread.<sup>19</sup> Despite investigations that found absolutely no evidence of such practices, the rumors continued.<sup>20</sup> People were so willing to believe the rumors that, in 1994, an American woman was attacked in Guatemala after she was falsely accused of trying to abduct a little boy in order to steal his organs.<sup>21</sup> She was beaten so badly that she was left permanently disabled.<sup>22</sup> Rumors continue throughout the developing world of ill people from developed countries adopting children or kidnapping people in order to gain healthy organs for transplant.<sup>23</sup>

The United States Agency for International Development refuted these allegations by stating that it was impossible to steal someone's organs because the advanced technology that would be needed and the ethical standards of those who are qualified to perform such operations were too high.<sup>24</sup> This refutation was published in 1996.<sup>25</sup> Since the publication of the

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18. USinfo.state.gov, The "Baby Parts" Myth: The Anatomy of a Rumor (May 1996), [http://usinfo.state.gov/media/Archive\\_Index/The\\_Baby\\_Parts\\_Myth.html](http://usinfo.state.gov/media/Archive_Index/The_Baby_Parts_Myth.html) (last visited Oct. 15, 2007) [hereinafter "Baby Parts" Myth]; see also Maria N. Morelli, Comment, *Organ Trafficking: Legislative Proposals to Protect Minors*, 10 AM. U. J. INT'L L. & POL'Y 917, 927-31 (1995).

19. "Baby Parts" Myth, *supra* note 18.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. "Health and organ transplant officials in the United States and other countries have stated emphatically that it would be impossible to successfully conceal any clandestine organ trafficking ring." "Baby Parts" Myth, *supra* note 18. "[T]he technical requirements that would be involved in arranging and operating an alleged murder-for-organ-transplantation scheme are so formidable that such clandestine activities are a

refutation, the world has become well aware that organ trafficking does exist. The technology needed is easily available to those able to pay for it. Doctors in some countries are more than willing to perform such operations.<sup>26</sup> While no one is actually waylaying people in hotel bars, there is still a thriving black market for organs obtained with less than informed consent and under less than sanitary conditions.<sup>27</sup>

## 2. *Real Stories of Organ Trafficking*

Unlike the “Baby Parts” myth, there are real cases of people being tricked into selling their organs through various stratagems. The Uzbek authorities broke up an organ trafficking ring in 2001.<sup>28</sup> One victim had been promised a job in Canada.<sup>29</sup> His body was found in his hometown; he never even left the country.<sup>30</sup> During the course of the investigation, the authorities found the passports of over sixty people who had been reported missing and over £6000 that was believed to be the proceeds from organ sales.<sup>31</sup>

Even individuals who are not killed for their organs still suffer from exploitation. Gheorgi Ungureanu from Moldova was promised a job in Israel.<sup>32</sup> Instead, he was taken to Turkey to have a kidney removed.<sup>33</sup> He

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practical impossibility.” *Id.* This refutation focuses on the clandestine taking of organs rather than open exploitation of the poor for their organs.

25. *Id.*

26. Erica Teagarden, *Human Trafficking: Legal Issues in Presumed Consent Laws*, 30 N.C. J. INT’L L. & COM. REG. 685, 687, 689 (2005).

27. *Id.* at 687, 689.

28. Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Donors*, HUM. RTS. BRIEF, Winter 2005, at 20.

29. *Id.* at 20.

30. *Id.*

31. *Id.*

32. *Id.* at 22.

33. *Id.*

was forced to sign papers consenting to the operation.<sup>34</sup> Now, although only forty-eight, he is unable to do heavy work.<sup>35</sup> In rural areas of South Asia, there are villages where almost three-fourths of the young people bear a scar from donating their kidneys.<sup>36</sup> These kidneys follow the money along the “established routes of capital.”<sup>37</sup> The kidneys are transferred from poor people to wealthy people.<sup>38</sup> One transplant coordinator at an Israeli hospital estimates that roughly 25% of individuals seeking kidney transplants bought the organ from a stranger.<sup>39</sup>

Just as there is a sex tourism industry,<sup>40</sup> a medical tourism industry has developed. This occurs when desperately ill and/or wealthy people from countries with no donor organ program, or one with long waiting lists, travel to countries where organs are bought from poor people for miniscule sums of money and then implanted in the ill person.<sup>41</sup> In Thailand, the private hospitals are willing to treat indigent accident victims because if the patient dies and the family is willing to donate the victim’s organs,<sup>42</sup> the hospital can have kidneys available for an expensive operation that is still much cheaper than in the United States.<sup>43</sup> Wealthy patients travel to Thailand and

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34. Glaser, *supra* note 28, at 22.

35. *Id.*

36. Teagarden, *supra* note 26, at 686.

37. *Id.*, quoting Nancy Scheper-Hughes, *Keeping an Eye on the Global Traffic in Human Organs*, 361 THE LANCET 1645, 1645 (2003).

38. *Id.*

39. *Id.* at 687.

40. “Sex tourism is defined as traveling to a foreign country with the intent to engage in sexual activity with others.” National Center for Missing and Exploited Children, Sex Tourism - What It Is, [http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=1498](http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1498), (last visited Oct. 15, 2007).

41. *Medical Tourism: Need Surgery, Will Travel*, CBC NEWS ONLINE, June 18, 2004, <http://www.cbc.ca/news/background/healthcare/medicaltourism.html> (last visited Oct. 25, 2007). See also *infra* notes 182-88 and accompanying text, which provides a better treatment of the subject.

42. Teagarden, *supra* note 26, at 689.

the hospital benefits. In another example, in Pakistan the coerced donation of organs is so prevalent that the country is referred to as a “kidney bazaar.”<sup>44</sup> The donors are paid up to \$2,500, with the money usually going to pay off debts.<sup>45</sup> Sometimes, the money is not enough to pay off the debts.<sup>46</sup> Most of the time, the donor receives no follow-up care; unable to work, the donor goes back into debt—meaning the sacrifice of the kidney was meaningless.<sup>47</sup>

China has a thriving medical tourism industry. The military itself runs several hospitals wherein prisoners are made involuntary donors.<sup>48</sup> The recipients are foreigners, many of them Canadians according to one article.<sup>49</sup> The practice has become so widespread that some researchers are calling for pharmaceutical companies to stop selling anti-rejection drugs to China.<sup>50</sup> They also want hospitals and healthcare providers to deny postoperative care to patients when they return from medical tourism trips in the hopes of ending the practice.<sup>51</sup>

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43. *Id.* at 691 (“The hospital would then have two kidneys available for transplant into two patients able to afford the \$10,000 cost of an operation that would cost about \$100,000 in the United States.”). The issue of the quality of care such a patient/potential recipient receives is beyond the scope of this Comment and is not one the author wishes to contemplate.

44. Sadaqat Jan, *Kidney Sales a Dire Solution for Pakistan’s Poor*, HOUS. CHRON., Nov. 13, 2006, at A13.

45. *Id.* The recipients of the kidneys pay \$6000 to \$12,000 for the operation.

46. *Id.*

47. *Id.*

48. *Chinese Army ‘Harvesting Body Parts’*, NEWS.COM.AU, Feb. 3, 2007, <http://www.news.com.au/story/0,23599,21152231-1702,00.html> (last visited Nov. 11, 2007).

49. *Id.*

50. *Id.*

51. *Id.*



### C. *International Agreements on Human Trafficking*

#### 1. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially in Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*

After the abolition movements of the 19th Century managed to outlaw slavery in almost every country,<sup>52</sup> there were still isolated incidents of individuals holding others in slavery or slave-like conditions in the United States.<sup>53</sup> International law recognized this universal condemnation of slavery with the 1926 Convention to Suppress the Slave Trade and Slavery.<sup>54</sup> But the interwar period saw little desire to interfere in the domestic concerns of other nations. World War II changed this reticence with the forced labor imposed for ideological or political purposes.<sup>55</sup> Reactions to the Nazis' forced labor provided the impetus for the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others in 1951,<sup>56</sup> and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practice Similar to Slavery in 1956,<sup>57</sup> which supplement the 1926 treaty.

52. Schomburg Center for Research in Black Culture, New York Public Library, In Motion – The African-American Migration Experience Timeline, <http://www.inmotionaame.org/timeline.cfm?bhcp=1> (last visited Nov. 11, 2007).

53. *See generally* United States v. Reynolds, 235 U.S. 133 (1914) (determining that peonage is a form of slavery made illegal by the Thirteenth Amendment); *see also* United States v. Booker, 655 F.2d 562, 564 (holding that the evidence presented was sufficient to prove that the defendants had engaged in kidnapping with the intent to hold plaintiffs as slaves).

54. Convention to Suppress the Slave Trade and Slavery art. 3-5, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

55. INT'L LABOR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR, GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, 8 (2005).

56. Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271.

57. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3.

These new treaties called for greater international cooperation and information sharing to end human trafficking conditions.<sup>58</sup>

The problem persisted and the world community became aware that the issue was exploitation, not merely forced labor. It struck at the most vulnerable members of society, the women and children.<sup>59</sup> At a conference in Palermo, Italy in December 2000, the delegates created an addition to the Convention on Transnational Organized Crime.<sup>60</sup> This Trafficking Protocol specifically addressed the issue of trafficking as one aspect of transnational crime.<sup>61</sup> The delegates declared that preventing trafficking “requires a comprehensive international approach,”<sup>62</sup> in order to prevent the crime and punish those who commit it.<sup>63</sup> They also declared that the Protocol was “to protect the victims of such trafficking, including by protecting their internationally recognized human rights.”<sup>64</sup> This Protocol took effect on September 9, 2003.<sup>65</sup>

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58. The 1926 treaty only stated that the nations should communicate their laws to each other. Convention to Suppress the Slave Trade and Slavery, *supra* note 54, art. 7. The 1956 Supplementary Convention calls on the nations to cooperate with each other, in addition to communicating regarding each nation’s individual laws. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 57, § V(8). The 1951 Convention approaches the problem from an international standpoint, and most of the provisions contain some form of international cooperation or action. See generally Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, *supra* note 56.

59. PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, G.A. Res. 55/383, pmbl., U.N. GAOR, 55th Sess., U.N. Doc A/RES/55/383 (Nov. 15, 2000), *reprinted in* 40 I.L.M. 335, 337 [hereinafter Trafficking Protocol].

60. *Id.*

61. G.A. Res. 53/11, ¶ 10, U.N. Doc. A/RES/53/111 (Dec. 9, 1998).

62. Trafficking Protocol, *supra* note 59, pmbl.

63. *Id.*

64. *Id.*

65. Trafficking Protocol, *supra* note 59.

#### *D. Federal Laws on Human Trafficking and Organ Trafficking*

##### *1. Trafficking Victim Protection Act of 2000<sup>66</sup>*

Recognizing that slavery had taken on a new form, a form now referred to as human trafficking, the United States Congress passed the Trafficking Victims Protection Act of 2000.<sup>67</sup> The law was enacted pursuant to the Interstate Commerce Clause of the United States Constitution.<sup>68</sup> Among other things, this law increased the penalties for human trafficking in recognition that existing laws did not carry strict enough penalties to convey society's distaste for these activities.<sup>69</sup> The law also carried provisions to provide protection to the victims of trafficking, including special visas for non-American victims trafficked into the United States.<sup>70</sup> This law was reauthorized in 2003 and 2005.<sup>71</sup>

66. 22 U.S.C. § 7101 (2000).

67. *Id.* § 7101(b)(1) (“[T]rafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”).

68. U.S. CONST. art. I, § 8. The committee reports state this section was the authority under which it was intended to be enacted. However, the TVPA does not require that the victim be brought across state lines as part of the trafficking enterprise. *United States v. Garcia*, 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088, at \*5-10 (W.D.N.Y. Dec. 2, 2003). A defendant challenged the constitutionality of the law on that issue claiming the law lacked the requisite jurisdictional hook. The U.S. District Court for the Western District of New York ruled that it did not matter since the Act would constitutional under the Thirteenth Amendment. *Id.*

69. 22 U.S.C. § 7101(b)(14). 22 U.S.C. § 7109 authorizes the amendment of the sentencing guidelines to enhance sentences for those convicted of crimes related to human trafficking. A sentence of life imprisonment may be imposed if force, fraud, coercion or the exploitation of children under age fourteen for a commercial sex act is involved. 18 U.S.C. § 1591 (2000). Almost all trafficking cases involved some form of force, fraud or coercion since that is part of the definition of trafficking. As meaningful as these sentences appear, the reality is less than ideal. Of the twenty-five people convicted under the TVPA and related statutes in 2005, ten received sentences for 1-10 years, five received sentences of 5-10 years, eight received sentences of 10+ years, one received only 12 months probation, and one received 37 months in prison and 36 months of probation. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2005, at 18 (2006) (hereinafter ATTORNEY GENERAL’S REPORT 2005).

70. 22 U.S.C. § 7105 (2000). A special T-visa may be generated for any victim of trafficking who meets certain requirements. T-visas also must be extended to family

One of the first cases brought under the TVPA was *United States v. Garcia*.<sup>72</sup> The defendants allegedly brought men and boys from Mexico to New York State and required them to work in the local agricultural industry.<sup>73</sup> They were allegedly not paid for this work.<sup>74</sup> The Indictment was upheld under the Thirteenth Amendment based on a constitutional challenge.<sup>75</sup> The opinion stated that the Thirteenth Amendment allowed Congress to pass laws “necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>76</sup> Further, the magistrate stated that although the historical context of the Thirteenth Amendment was ending slavery in the United States with regards to African-Americans, it had been expanded to include slavery of any type.<sup>77</sup>

In the 2006 mandated report on enforcement activities, the Justice Department reported twenty-seven cases prosecuted or pending against traffickers in 2005.<sup>78</sup> The activities prosecuted show the various forms that

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members of the victim. There is a cap of 5000 of these visas generated per year. 8 C.F.R. § 214.11(m) (2007).

71. See generally Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3560.

72. *United States v. Garcia*, 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088, at \*1 (W.D.N.Y. Dec. 2, 2003).

73. *Id.* at \*2.

74. *Id.*

75. *Id.* at \*4-5

Although the defendant has submitted a detailed recitation of cases interpreting the application of Article 1, § 8 of the United States Constitution in support of her position, the defendant has missed the mark in that approach. For the reasons hereinafter set forth, the Court does not have to address the applicability of Article 1, § 8 of the United States Constitution in determining whether Congress acted within its authority when it legislated [the TVPA] . . . . Constitutional authority for this legislation is found in the *Thirteenth Amendment* to the United States Constitution . . . . (emphasis added).

76. *Id.* at \*6 (quoting *Jones v. Alfred H. Mayer, Co.* 392 U.S. 409 (1968)).

77. *Id.* at \*7.

trafficking takes. In *United States v. Babaev*, the defendants brought young women from Azerbaijan to New York for prostitution between March 2003 and March 2004.<sup>79</sup> The victims were held through threats of force and threats against their families back home.<sup>80</sup> In the case of *United States v. Zavala*, the defendants, between June 2001 and June 21, 2004, illegally obtained visas for Peruvians to come to the United States.<sup>81</sup> Once in the United States, their passports were confiscated and they were forced to work for the defendants.<sup>82</sup> Their paychecks were confiscated to pay off their "debt" to the defendants for bringing them into the United States.<sup>83</sup> Two defendants in *United States v. Kaufman* were charged with holding the mentally ill residents of a residential treatment home in involuntary servitude.<sup>84</sup> This went on for twenty years.<sup>85</sup> The victims were forced to perform labor for the "defendant's entertainment and benefit, including nudity and sexually explicit acts."<sup>86</sup> Child prostitution was the subject of *United States v. Komala* and *United States v. Gouw*, wherein young Indonesian women and teenage girls were brought to the United States to work as prostitutes and nude dancers.<sup>87</sup> Their immigration documents were confiscated on arrival in the United States and they were forced to live in a home monitored and controlled by one of the defendants.<sup>88</sup>

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78. ATTORNEY GENERAL'S REPORT 2005, *supra* note 69, at 16. Of the twenty-seven cases, nineteen were sex trafficking cases. *Id.* at 16.

79. *Id.* at 18.

80. *Id.*

81. *Id.* at 19.

82. *Id.*

83. ATTORNEY GENERAL'S REPORT 2005, *supra* note 69, at 19.

84. *Id.* at 20.

85. *Id.*

86. *Id.* at 20-21.

87. *Id.* at 21.

88. ATTORNEY GENERAL'S REPORT 2005, *supra* note 69, at 21.

According to the committee reports, in 2000, the main concern of committee members was ensuring that the allowance of special T-visas<sup>89</sup> for victims is not abused and given to those making false claims.<sup>90</sup> In 2003, the goal of the committee during reauthorization was to improve the law in accordance with the information gathered in the three years since its enactment.<sup>91</sup> The ideal was to strengthen the United States' ability to combat global trafficking.<sup>92</sup> By 2005, it became clear that by focusing on those being trafficked into the United States, the established system did not protect domestic trafficking victims.<sup>93</sup> The point that year was to ensure protection for domestic victims and to combat trafficking by U.S. contractors overseas.<sup>94</sup> The issue of organ trafficking never appears in any of the committee reports regarding the TVPA.<sup>95</sup>

## 2. *Organ Trafficking Law*

Federal law expressly prohibits selling human organs if "the transfer affects interstate commerce."<sup>96</sup> It prohibits the transfer of any organ part for valuable consideration when the part will be used in transplantation.<sup>97</sup>

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89. T-Visas are temporary resident visas that allow trafficking victims to remain in the United States for a period of time. They also allow the holder to later apply for permanent residency which can lead to U.S. citizenship. U.S. Dept. of Justice, DEPARTMENT OF JUSTICE ISSUES T VISA TO PROTECT WOMEN, CHILDREN AND ALL VICTIMS OF HUMAN TRAFFICKING, Jan. 24, 2002, *available at* [http://www.usdoj.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm) (last visited Oct. 15, 2007).

90. *See* H.R. REP. NO. 106-487, pt. II, at 18 (2000).

91. H.R. REP. NO. 108-264, pt. 1, at 8 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2408, 2408.

92. *Id.*

93. H.R. REP. NO. 109-317, pt. 1, at 10-11, 17 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 1888, 1889.

94. *Id.*

95. *See* H.R. REP. NO. 106-939 (2000) (Conf. Rep), *as reprinted in* 2000 U.S.C.C.A.N. 1380; H.R. REP. NO. 108-264; H.R. REP. NO. 109-317 (lacking any mention of organ trafficking).

96. 42 U.S.C. § 274e(a) (2000).

97. *Id.*

Congress enacted this law in 1984 as part of the establishment of an overall national transplantation system.<sup>98</sup> It recognized the need for a “rational policy” to balance those needing organs with those willing to donate. Outlawing organ selling was part of that “rational policy.”<sup>99</sup> The “prohibition on the buying and selling of human organs [was] directed at preventing the for-profit market of kidneys and other organs.”<sup>100</sup> If the for-profit market were not prohibited, it seems inevitable that those with the most money would get the organs, not necessarily those most in need. However, because issues related to organ procurement such as “consent, definition of death, autopsy, burial and the disposition of dead bodies is exclusively state law,”<sup>101</sup> the enacted law only dealt with interstate commerce.<sup>102</sup> This was the first attempt in the United States at a national policy for organ donation, so it was very cautious. However, since the 1984 enactment, only one amendment was made—to expand the definition of a human organ.<sup>103</sup> That occurred in 1988, since then, no further changes to the prohibition against organ trafficking have occurred.<sup>104</sup>

In 1999, two men were indicted under this law, but the indictment was quashed on the grounds that the only proof of the conspiracy to traffic organs was an unreliable confidential informant that the government refused

98. S. REP. NO. 98-382, at 1-2 (1984), as reprinted in 1984 U.S.C.C.A.N. 3975, 3975-76.

99. *Id.*

100. *Id.* at 4, as reprinted in 1984 U.S.C.C.A.N. 3975, 3978.

101. *Id.* at 17, as reprinted in 1984 U.S.C.C.A.N. 3975, 3982-83. State laws relating to organ trafficking are beyond the scope of this Comment. Additionally, most states are ill-equipped to cope with the international dimensions of organ trafficking.

102. 42 U.S.C. § 274e(a) (2000).

103. Health Omnibus Programs Extension of 1988, Pub. L. No. 1006-607, § 406, 102 Stat. 3048, 3116.

104. There is proposed legislation to exempt paired donations from the prohibition against organ trafficking. H.R. 710, 110th Cong. (2007). Paired donation is when Donor A is a close relative of Recipient A but is not a match for a donation. Donor B is a close relative of Recipient B but is not a match for a donation. Donor A is a match for Recipient B and Donor B is a match for Recipient A. The two Donors then pair up to donate to the Recipient to which they match. *Id.*

to produce.<sup>105</sup> There have been no other reported cases related to organ trafficking in the United States.

## II. STATEMENT OF LAWS

### A. *Definition of Trafficking in the Protocol*

The Protocol defined trafficking in persons as

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or *the removal of organs*.<sup>106</sup>

### B. *Definition of Trafficking in the TVPA*

The TVPA defines a severe<sup>107</sup> form of trafficking persons (other than sex trafficking)<sup>108</sup> as “the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”<sup>109</sup>

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105. United States v. Wong, No. 98 CR. 199, 1999 WL 138930, at \*1 (S.D.N.Y. March 15, 1999).

106. Trafficking Protocol, *supra* note 59, art. 3(a) (emphasis added).

107. There is no “non-severe” definition of trafficking in the TVPA. All forms of trafficking are considered “severe.”

108. The severe form of trafficking in persons is defined as “sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or on which the person induced to perform such act has not attained 18 years of age.” 22 U.S.C. § 7102(8)(A) (2000). Sex trafficking is defined as “the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act.” *Id.* § 7102(9).



### III. ANALYSIS

The federal TVPA and the international Trafficking Protocol approach the same problem in different ways. The TVPA takes a purpose-based approach. The purpose for which the person is trafficked is the focus of the law. It is concerned with the reason for the trafficking—the victim is subjected to forced labor or services, or commercial sex acts through force, fraud or coercion.<sup>110</sup> Under the Trafficking Protocol, the approach is more centered on the relationship between the trafficker and the victim. It is about exploitation of the victim, whether for labor, services or other reasons.<sup>111</sup> The trafficker takes advantage of the vulnerability of the victim to exert control.<sup>112</sup> Regardless of the approach, the two laws should be reconciled in order for the United States to continue its goal of leading the fight against all forms of human trafficking<sup>113</sup> and to enhance international enforcement efforts.

Although the Trafficking Protocol was ratified and signed in December 2005,<sup>114</sup> Congress must still domesticate it (make it federal law). In order to become domestic law, the Protocol must either be a self-executing treaty<sup>115</sup> or Congress must implement it through appropriate legislation.<sup>116</sup> The

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109. *Id.* § 7102(8)(B). The states that have specific human trafficking laws tend to follow the federal definition, except for Minnesota, which includes organ trafficking in its statute of prohibited human trafficking activities. MINN. STAT. § 609.281 (2006).

110. 22 U.S.C. § 7102(8)(B).

111. Trafficking Protocol, *supra* note 59, art. 3(a) (stating “the recruitment, transportation, transfer, harbouring or receipt of persons . . . for the purpose of exploitation.”).

112. *Id.* (“abuse of power or of a position of vulnerability”).

113. 22 U.S.C. § 7101(a), (b)(23) (2000).

114. Media Note from the Office of the Spokesperson, U.S. Dep’t of State, United States Becomes Party to Anti-Trafficking Protocol: Marks Slavery Abolition Day (Dec. 1, 2005), <http://www.state.gov/r/pa/prs/ps/2005/57532.htm>.

115. A self-executing treaty is one that (1) needs no legislation in order to bring its obligations into effect and (2) is judicially enforceable by an individual. BARRY CARTER, INTERNATIONAL LAW 168-70 (4th ed. 2003). *See, e.g.,* Asakura v. City of Seattle, 265 U.S. 332, 342 (1924); Hong v. United States 112 U.S. 536, 540 (1884).

116. *See* CARTER, *supra* note 115.

Protocol is not self-executing, as it contains the specific clause “[e]ach state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”<sup>117</sup> Therefore, by its own terms, the United States must enact statutes to implement the object and purpose of the Protocol. The TVPA already complies with most of the requirements of the Trafficking Protocol. All that remains is to include organ trafficking in the definition in order to domesticate fully the Trafficking Protocol.

*A. Uniformity is Essential to Collaborative International Efforts*

The only way to address this crime, wherein the actions tend to be the movement of organs from poor to rich countries,<sup>118</sup> is through international cooperation and the development of a common, transnational strategy.<sup>119</sup> The United States must work with other countries to stem the flow of organs and stop the travel undertaken solely to save money on the transplant.

The U.S. Department of Justice works with law enforcement in other countries to aid nations in building the capacity to prosecute traffickers and aid victims.<sup>120</sup> The questions asked by the United States before formulating a capacity building plan do not even begin to take into account organ trafficking.<sup>121</sup> The questions approach the issue from the U.S. perspective of

117. Trafficking Protocol, *supra* note 59, art. 5. Article 3 of the Protocol states that “[e]xploitation shall include, at a minimum, the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Trafficking Protocol, *supra* 59, art. 3.

118. Teagarden, *supra* note 26, at 686.

119. Trafficking Victims Protection Act[0] of 2000 § 102(b)(24), 22 U.S.C. § 7101(b)(24) (2000).

120. DEP’T OF JUSTICE REPORT 2001-2005, *supra* note 10, at 48 (“Once the assessment is completed, the United States government, through the local United States Embassy, and the host government enter into a Letter of Agreement . . .”).

121. *Id.* at 47-49 (posing the assessment questions: “Who are the victims and where do they come from?”; “What kind of coercion is used to control the victims?”; “Is there trafficking of minors into sexual exploitation?”; “What industries tend to have labor trafficking?”). From these a matrix is formed that allows a victim centered approach to be developed. The goal is to get help for the victims and “hold perpetrators accountable.” *Id.* at 48-49. If the goal is “restorative care” for the victim, the U.S. approach fails to answer how to aid the victims of organ trafficking.

labor or sex trafficking.<sup>122</sup> Although labor and sex trafficking are the largest types of human trafficking, a nation may have a significant organ trafficking problem that it might lack the capacity to address. By not even recognizing that organ trafficking is human trafficking, capacity building efforts may fail to be as comprehensive as they could be to address all forms of trafficking.

This problem is exacerbated by the efforts of the U.S. Dept. of Justice that concentrate on only three themes: 1) sex trafficking; 2) labor trafficking; and 3) sex trafficking of children.<sup>123</sup> Therefore, coordination, capacity building, and eradication will focus on the causes and results related to these themes. If the issue is not considered a priority, enforcement of organ trafficking laws may be lacking due to limited resources.

Further stretching limited resources in poorer countries that are struggling to address such a large problem is the United States' annual report assessing the efforts of other nations to combat trafficking.<sup>124</sup> The assessment is based on minimum standards as established in the TVPA.<sup>125</sup> These minimum standards require that a nation prohibit severe forms of human trafficking, punish it appropriately, provide protection to the victims, and cooperate with other nations to prevent and punish trafficking.<sup>126</sup> The definition of severe forms of trafficking is governed by the definition given in the Act.<sup>127</sup> As noted, this definition does not include organ trafficking.

The State Department report ranks each nation, placing them in three tiers. Tier One is nations that are meeting the minimum standards set by the

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122. *Id.* at 48.

123. *Id.* at 23.

124. Victims of Trafficking and Violence Protection Act of 2000 § 110(b), 22 U.S.C. § 7107(b) (2000).

125. *Id.* § 7106(a).

126. *Id.*

127. Defining the term as

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has no attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

*Id.*

United States; Tier Two is those that are “making significant efforts to bring themselves into compliance;” Tier Three is those nations that are not attempting to fight human trafficking.<sup>128</sup> Nations in Tier Two may be placed on a Special Watch list if they are in danger of slipping to Tier Three.<sup>129</sup> Being placed on the Special Watch List means that nation is not progressing adequately towards reaching the minimum standards set by the United States.<sup>130</sup> A nation on this list is subject to mandatory sanctions if it does not being to make adequate progress within the next year.<sup>131</sup> A nation desirous of avoiding the Special Watch List would be more willing to focus on those forms of trafficking found in the U.S. definition of trafficking rather than the international one in order to be removed from the Watch List. Regardless of its own problems with organ trafficking, which might be quite severe, a nation seeking U.S. aid in capacity building will put its limited resources towards ending practices which concern the United States and form the basis of the report. Resources will be focused on labor and sex trafficking. Resources will not be focused on the area of organ trafficking. A nation must prioritize its resources and the United States should not compound the difficulty of a nation’s decisions regarding where to focus its limited resources by an overly restrictive definition of organ trafficking.

The U.S. Senate passed a resolution on February 20, 2005, calling for ratification of the Trafficking Protocol stating that ratification would “enhance the ability of the U.S. government to render and receive assistance on a global basis in the common struggle to prevent, investigate, and prosecute trafficking in persons.”<sup>132</sup> This shows that the Senate understands the need for a common basis to coordinate activities in order to fight a transnational and growing problem. A unified definition that includes all forms of trafficking currently troubling nations would reinforce this common basis.

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128. *Id.* § 7107(b)(1)(A)–(C).

129. *Id.* § 7107(b)(3).

130. *Id.*

131. *Id.* § 7107(d).

132. S. Res. 48, 109th Cong. (2005).

*B. Lack of Inclusion Denies TVPA Protection to the Victims of Trafficking Brought to this Country*

While the United States has an organ trafficking law, it does not provide for any protections for the victim of organ trafficking.<sup>133</sup> The trafficking law is a criminal statute focused on punishing the criminal. A victim of a trafficker convicted under this law would not be eligible for any benefits or protections guaranteed to victims under the TVPA.<sup>134</sup>

A person who is trafficked into this country is entitled to the same benefits as any refugee once the victim is certified by the Department of Health and Human Services.<sup>135</sup> This certification process requires that the victim had been subjected to a severe form of trafficking as defined in the TVPA.<sup>136</sup> Only those who are victims of a severe form of trafficking may be certified and may then receive federal and/or state benefits.<sup>137</sup> A victim of organ trafficking brought to the United States would not meet this definition since organ trafficking is not found in the TVPA.

While a victim could claim refugee status under another standard,<sup>138</sup> few victims of trafficking are denied continuing presence status in the United States.<sup>139</sup> Without this certification, a victim of organ trafficking can be held in a detention facility while a certified victim of another form of trafficking would not.<sup>140</sup> Certification grants a victim access to federal and state

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133. 42 U.S.C. § 274e.

134. 22 U.S.C. § 7105 (2000) (stating that a victim of traffic is entitled to benefits under the TVPA, including housing and work assistance); 42 U.S.C. § 274e (2000) (containing no provision for victim benefits under the organ trafficking law).

135. 22 U.S.C. § 7105(b) (2000).

136. *Id.* § 7105(b)(1)(E).

137. *Id.* § 7105(b)(1)(A), (E) (2000 & Supp. IV 2004).

138. Other standards include being persecuted based on race, religion, political opinion or being a member of a specified social group. 8 C.F.R. § 208.13(b)(1).

139. In 2005, 160 requests were made with 158 being granted. The two that were denied were denied due to law enforcement requesting the withdrawal as there was insufficient evidence that they were victims of trafficking. ATTORNEY GENERAL'S REPORT 2005, *supra* note 69, at 11.

140. The TVPA prohibits a victim of trafficking from being held in a facility inconsistent with his/her status of being a victim. 22 U.S.C. § 7105(c)(1) (2000).

benefits denied to those who are not legally in this country and/or are subject to deportation.<sup>141</sup> A victim of organ trafficking cannot prove a credible fear of persecution upon return to his/her home country.<sup>142</sup> A non-certified victim could not get housing, access to job training, or even health care.<sup>143</sup> A victim of organ trafficking especially needs access to health care because of the special health problems related to organ removal.<sup>144</sup>

By changing the TVPA to include organ trafficking, the victims of this form of human trafficking would be eligible for the same benefits as those subject to other forms of human trafficking. There should be no discrimination between victims of trafficking based on the form. All are victims and all are equally deserving of protection. Extending the protection to the few victims of organ trafficking who might be trafficked into this country probably would not overwhelm refugee services. There are few enough that they could most likely be easily fit into the existing system. There is currently a cap of 5000 T-visas a year.<sup>145</sup> Thousands of T-visas remain available every year.<sup>146</sup> Therefore, it is unlikely that extending the TVPA protections to organ trafficking victims will put any further strain on a system designed to handle 5000 that in reality handles far less. Inclusion of organ trafficking in human trafficking would enable all victims of any form of trafficking to be treated the same, which would allow for easier delivery of services.

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141. U.S. Dep't of Health & Human Servs., Fact Sheet: Certification for Victims of Trafficking, *available at* [http://www.acf.hhs.gov/trafficking/about/cert\\_victims.html](http://www.acf.hhs.gov/trafficking/about/cert_victims.html) (last visited Oct. 15, 2007).

142. 8 C.F.R. § 208.13.

143. U.S. Dep't of Health & Human Servs., *supra* note 141.

144. Glaser, *supra* note 28, at 22.

145. 8 C.F.R. § 214.11(m) (2007).

146. The 1000th victim of trafficking was just certified in May 2006. HHS Announces 1000th Victim of Human Trafficking Certified (May 22, 2006), *available at* [http://www.acf.hhs.gov/news/press/2006/1000\\_trafficking\\_victims\\_certified.htm](http://www.acf.hhs.gov/news/press/2006/1000_trafficking_victims_certified.htm) (last visited Oct. 15, 2007). Even including families, the 5000 total figure has not been reached.

C. *Too Broad a Definition of Trafficking Could Overwhelm Prevention and Prosecution Efforts.*

The reason for the Trafficking Protocol and the TVPA was to prevent trafficking— especially in women and children.<sup>147</sup> Congress expressly declared this in the legislative findings attached to the TVPA.<sup>148</sup> Women and children are most likely trafficked for prostitution purposes, not their organs.<sup>149</sup> Men are mostly exploited for their organs.<sup>150</sup> Since 2001, there have been fifty-nine cases filed under the TVPA.<sup>151</sup> The federal organ trafficking law has had only one known case filed since the law passed over twenty years ago.<sup>152</sup> This suggests the problem of human trafficking for labor and sex is more prevalent than organ trafficking. However, it could also signal a problem with recognition, first responders just do not recognize that organ trafficking is a trafficking situation.

Although slavery has been outlawed in the United States for almost 150 years, there have been a few slavery cases brought in recent times. Those holding others in involuntary servitude were charged with a host of other crimes such as pimping, failure to pay wages, etc.<sup>153</sup> Therefore, it could be

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147. Trafficking Protocol, *supra* note 59, pmbl. (“Declaring that effective action to prevent and combat trafficking in persons, *especially women and children*, requires a comprehensive international approach . . . .”) (emphasis added); 22 U.S.C. § 7101(b) (2000) (stating in the statute’s findings that “at least 700,000 persons annually, *primarily women and children*, are trafficked within or across borders,” that the sex industry “involves sexual exploitation of persons, predominantly *women and girls*, involving activities related to prostitution . . . and other commercial sexual services,” that “[t]he low status of *women* in many part of the world has contributed to a burgeoning of the trafficking industry, and that “traffickers primarily target *women and girls*”) (emphasis added).

148. 22 U.S.C. § 7101.

149. *Id.* (the most common form of human trafficking is sex trafficking which mainly involves women and children).

150. Teagarden, *supra* note 26, at 686 (“Generally, the donor is a young man between the ages of 18 and 28 who sells his kidney for \$2000–\$3000.”).

151. ATTORNEY GENERAL’S REPORT 2005, *supra* note 69, at 16.

152. United States v. Wang, No. 98 CR. 199, 1999 WL 138930 (S.D.N.Y. Mar. 15, 1999).

that organ trafficking is occurring in greater numbers, but is not being recognized by the authorities. One reason for the increased number of prosecutions for trafficking is simply efforts on the part of law enforcement and prosecution to bring such charges.<sup>154</sup> Interpol has reached the same conclusion with regards to human trafficking.<sup>155</sup> The same efforts currently applied to other forms of human trafficking if applied to organ trafficking could produce similar results.

Law enforcement must set its priorities. Since 2000, only 1000 people have been certified as victims of trafficking in the United States.<sup>156</sup> The problem is not one of difficulties with the certification process itself, but of identifying the victims so they may be certified.<sup>157</sup> Education continues for law enforcement in recognizing the signs of trafficking.<sup>158</sup> Prosecutions of traffickers are going up each year.<sup>159</sup> But, resources are limited. They should be directed at protecting the larger percentage of victims of trafficking for labor and services, rather than on what some believe is more myth than reality.

Nations that have trafficking problems are rarely limited to one form of trafficking. Where there is forced labor and sex trafficking, there can be found organ trafficking.<sup>160</sup> India is one such nation where this is true.<sup>161</sup> Education and aid efforts to reduce the root causes of trafficking—such as

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153. 22 U.S.C. § 7101(b)(14).

154. DEP'T OF JUSTICE REPORT 2001-2005, *supra* note 10, at 23.

155. INTERPOL, FACT SHEET: TRAFFICKING IN HUMAN BEINGS, *available at* <http://www.interpol.int/Public/ICPO/FactSheets/THB02.pdf> (last visited Nov. 11, 2007).

156. U.S. Dep't of Health & Human Servs., *supra* note 141.

157. DEP'T OF JUSTICE REPORT 2001-2005, *supra* note 10, at 10.

158. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CAMPAIGN TO RESCUE & RESTORE VICTIMS OF HUMAN TRAFFICKING, ABOUT RESCUE AND RESTORE, *available at* [http://www.acf.hhs.gov/trafficking/rescue\\_restore/index.html](http://www.acf.hhs.gov/trafficking/rescue_restore/index.html) (last visited Sept. 24, 2007).

159. ATTORNEY GENERAL'S REPORT 2005, *supra* note 69, at 16.

160. Teagarden, *supra* note 26, at 686.

161. *Id.*



poverty—can just as easily accommodate organ trafficking as another form of trafficking without additional resources. The same is true for capacity-building efforts. Efforts to prevent and punish any form of human trafficking can easily accommodate other forms of human trafficking. Sadly, there are so few cases in the United States under the current definition of human trafficking,<sup>162</sup> it is unlikely that the addition of organ trafficking to the definition will open the floodgates and overwhelm the courts.

It is clear that Congress never intended that human trafficking be rigidly defined. Congressional intent was to encompass more than merely sex trafficking or forced labor.<sup>163</sup> This intent is explicit in the legislative findings attached to the TVPA in that “trafficking in persons is not limited to sex trafficking but often involves forced labor and *involves other significant violations of . . . public health and human rights standards worldwide.*”<sup>164</sup> Organ trafficking is encompassed by the latter mention of other internationally recognized crimes, which should include the Trafficking Protocol making organ trafficking a recognized international crime. Given this, it would be a simple matter to amend the TVPA to include the wording of the Trafficking Protocol to fully comport with the findings of the TVPA.

The TVPA was clearly intended to cover much more than labor or sex trafficking. Including organ trafficking will fulfill that intent. The floodgates argument has never been valid where the crime committed is one that is so repugnant to society. A system designed to protect victims and to punish wrongdoers can surely handle the prosecution of a few more wrongdoers for such terrible crimes as taking someone’s organs for profits. Priorities must be set, but a civilized society sets those priorities by the values it wants to uphold. Organ trafficking should be as much a priority as sex trafficking. Finding the perpetrators is as difficult as finding the victims. The few cases that can be found and are prosecutable should not overwhelm the system to the extent of being an argument against inclusion.

#### *D. The United States Already Has a Law to Address Organ Trafficking*

There is a federal law already in existence that makes it a crime to buy or sell an organ in such a way as to affect interstate commerce.<sup>165</sup> An organ that is internationally trafficked would also give Congress jurisdiction under the Commerce Clause, as this clause concerns the regulation of commerce

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162. ATTORNEY GENERAL’S REPORT 2005, *supra* note 69, at 16.

163. 22 U.S.C. § 7101(b) (2000).

164. *Id.* § 7101(b)(3) (emphasis added).

165. 42 U.S.C. § 274e.

with foreign nations as well as between states.<sup>166</sup> Therefore, it would appear there is no need for another law regarding organ trafficking.

The current organ trafficking law prohibits anyone from acquiring, receiving or transferring any human organ.<sup>167</sup> On the plain face of the statute, it would appear to cover everyone involved in organ trafficking, including any middle men who handle the organ. However, the person who merely facilitates the meeting between the trafficker and the end user, since that person is not actually transferring the organ, might not fall under this provision. The TVPA includes provisions for anyone who benefits from a trafficking enterprise, even if the person is not actively involved in the trafficking.<sup>168</sup> Inclusion of organ trafficking in the TVPA would expand authorities' ability to prosecute to those peripherally involved in the trafficking.

The prohibition against organ trafficking only applies if it affects interstate commerce.<sup>169</sup> However, this is the wrong jurisdictional hook for this crime. The TVPA was enacted under the power given to Congress pursuant to the Thirteenth Amendment, not the Commerce Clause.<sup>170</sup> The issue addressed by that amendment is the treatment of people, not the goods produced or the effect on commerce.<sup>171</sup> It is the same with organ trafficking. Organ trafficking is not a commercial venture that needs overseeing; it is a human rights violation. The scars left by organ trafficking—if the person survives the encounter with the trafficker—are “badges and incidents of

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166. U.S. CONST. art. I, § 8, cl. 1, 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .”).

167. 42 U.S.C. § 274e.

168. 22 U.S.C. § 7108(a) (2000).

169. 42 U.S.C. § 274e.

170. *United States v. Garcia*, 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. Dec. 2, 2003).

171. U.S. CONST. amend. XIII.

slavery.”<sup>172</sup> By adding organ trafficking to the TVPA, Congress would recognize this issue for the real crime it represents.<sup>173</sup>

The United States currently has laws regarding pimping, pandering, involuntary servitude, and child prostitution.<sup>174</sup> However, these were deemed inadequate to address the issue of human trafficking.<sup>175</sup> Congress determined it was better to have one law focusing on the crime, mandating international cooperation, and enhancing the current punishments.<sup>176</sup> It is easy to reach the same conclusion regarding the organ trafficking law. By bringing it under the TVPA, organ trafficking would have the same sentencing enhancements as other forms of human trafficking. Law enforcement would give and receive cooperation with their foreign counterparts to prevent and punish transnational acts. Finally, bringing organ trafficking under the TVPA would bring the needed focus on this issue that is currently lacking.

The TVPA recognized that trafficking is not merely the importation of people for forced labor or sexual servitude (that pedophiles and others will often travel to other countries where sex is for sale).<sup>177</sup> This is known as sex tourism.<sup>178</sup> The offense includes foreign travel for illicit sexual conduct.<sup>179</sup> To qualify as sex tourism, the act need not occur within the territorial jurisdiction of the United States if the victim is a person who is under the

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172. *United States v. Stanley*, 109 U.S. 3, 20 (1883).

173. It would also prohibit the selling of organs solely within a state, which the current organ trafficking law does not reach, since the federal jurisdictional hook would fall under the Thirteenth Amendment and not the interstate commerce clause.

174. 18 U.S.C. § 2421 (2000) (pimping); 18 U.S.C. § 2422 (2000 & Supp. V 2005) (pandering); 18 U.S.C. § 1589 (2000) (involuntary servitude); 18 U.S.C. § 2251 (2000 & Supp. V 2005) (child prostitution).

175. 22 U.S.C. § 7101(b)(14).

176. *Id.*

177. 18 U.S.C. § 2423(b)–(c) (2000 & Supp. V 2005).

178. *Id.*

179. *Id.*

age of eighteen.<sup>180</sup> The crime of sex tourism includes those who advertise or promote such “tours” along with the “tourists” and providers of the sex services.<sup>181</sup>

Medical tourism also exists. It is estimated that 10% of the patients at transplant clinics in Pakistan are foreigners.<sup>182</sup> Much the same situation occurs in Thailand.<sup>183</sup> The private hospitals there have some of the best facilities in the world in order to accommodate those looking for an organ transplant operation, and the cost is one-tenth the cost of the same operation in the United States.<sup>184</sup> In China, the army is actively involved in harvesting organs from prisoners without their consent.<sup>185</sup> The organs are then implanted in foreign recipients.<sup>186</sup> If organ trafficking were considered one aspect of trafficking, medical tourism could be criminalized just as sex tourism is. Again, the providers, the promoters, and the agents could all be

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180. *Id.* § 2423(d) (Supp. V 2005).

181. *Id.*

Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

182. Sadaqat Jan, *Kidney Sales a Dire Solution for Pakistan's Poor*, Hous. Chron., Nov. 13, 2006, at A13.

183. Thailand is also well known for its sex tourism. Child Exploitation & Obscenity Section, U.S. Dep't of Justice, Child Sex Tourism, <http://www.usdoj.gov/criminal/ceos/sextour.html> (last visited Nov. 11, 2007).

184. Teagarden, *supra* note 26, at 689. A kidney transplant costs \$10,000 in Thailand and approximately \$100,000 in the United States.

185. *Chinese Army 'Harvesting Body Parts'*, *supra* note 48.

186. *Id.* Recent legislation in China allegedly restricts this practice by giving Chinese citizens priority when organs become available. However, given China's past history in this area, medical tourism likely will continue to thrive and be a lucrative source of income in China. Edward Cody, *China Restricts Organ Transplants for Foreigners*, WASH. POST, July 4, 2007, at A12.

held accountable along with the buyers of the organs.<sup>187</sup> Yet, under the current organ trafficking law, only the buying and selling of organs is criminalized.<sup>188</sup> With the addition of a law prohibiting medical tourism, the pressure to end this practice will increase by holding more participants accountable.

The laws against the other forms of trafficking were found to be insufficient, so a single unifying law was passed. The current law against organ trafficking is inadequate. The creation of a separate law for organ trafficking will only fragment efforts and protections of victims. Integration into the current TVPA will extend benefits to the victims and ensure uniform punishment for all aspects of organ trafficking.

#### IV. CONCLUSION

Whether the victims are forced to labor without wages, forced into the sex industry, or sell their organs for a pittance, the end result is the same. The victim is exploited for labor, sex, or body parts. The United States needs to change the focus of its law from the end result—labor or sex—to the purpose of the trafficking—exploitation. The United States should amend the TVPA to include organ trafficking. Just as separate laws relating to involuntary servitude and prostitution failed to address those problems adequately, so too does a separate organ trafficking law. A uniform definition of trafficking among all nations will enable the United States to work more efficiently with other countries to stop trafficking in all its aspects. It will enable the United States to prosecute those who exploit others whether for labor, sex or organs, and all who benefit from such exploitation. One law for all the forms of trafficking will ensure proper and meaningful punishments for the perpetrators. Organ trafficking is a form of slavery and it is a crime that is just as deserving of international efforts to eradicate as labor or sex trafficking.

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187. As the victim of the crime, the sellers should not be held responsible, but treated as any other victim of trafficking.

188. 42 U.S.C. § 274e (2000).